IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 1254 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE C.K.BUCH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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RAMESHKUMAR NATHMALJI DARJI
Versus
STATE OF GUJARAT

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Appearance :
MR NN PRAJAPATI for Appellant.
MS DS PANDIT, ADDL. PUBLIC PROSECUTOR for Opponent

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CORAM : HONOURABLE MR.JUSTICE C.K.BUCH

Date : 12/09/2007

ORAL JUDGMENT

The accused-convict has filed this appeal through

jail and learned advocate Mr. N.N. Prajapati has been appointed to appear for the appellant. After adjourning the matter on three occasions earlier at the request of learned advocate Mr. Prajapati, yesterday I have heard Mr. Prajapati as well as Ms. D.N. Pandit, learned Additional Public Prosecutor at length in the late hours. As the arguments were concluded yesterday, the matter is listed today for dictation of judgment. However, when the matter is called out today for dictation of judgment, Mr. Prajapati sought further time as he would like to find out some more authorities and make further submissions. This request cannot be accepted in view of the earlier adjournments granted to Mr. Prajapati and the fact that the hearing concluded yesterday when Mr. Prajapati made lengthy submissions.

By filing the present appeal, the appellant, original accused, Rameshkumar Nathmalji Darji, has assailed the legality and validity of the order of conviction and sentence recorded against him by learned Additional City Sessions Judge and Fast Track Court No.3, Ahmedabad City in Sessions Case No. 311 of 2004. The learned trial Judge has held the accused guilty of the charge of offences punishable under section 328 and 394 of the Indian Penal Code and sentenced him to undergo 5 years' rigorous imprisonment for offence punishable under section 328, IPC and fine of Rs.2000/-, in default of payment of fine 6 months' simple imprisonment, as also to undergo 6 years to rigorous imprisonment for offence punishable under section 394, IPC and fine of Rs.2500/-, in default of payment of fine, simple imprisonment for 6 months. Both the sentences were ordered to run concurrently.

Mr. Prajapati, learned advocate for the appellant has taken me through the oral as well as documentary evidence led during the course of the trial as also the judgment under challenge. Mr. Prajapati has mainly argued that there is delay in filing the FIR and there is scope of confusion as to the identity of the accused. According to Mr. Prajapati, the complainant lodged his complaint on 19.06.02 at Abu Road alleging that somebody has stolen his luggage and other valuables including the cash that he was carrying in the pocket of his pants during the night hours, anytime after 11.55 PM and after boarding the train going from Ahmedabad to Ajmer. He has narrated the incident in the complaint. However, as the offence was committed in the territorial jurisdiction of the city of Ahmedabad, the Abu Road Police Station transferred the FIR to Ahmedabad. The Ahmedabad Police was not able to reach to the accused as no name or other description was clearly available to the police, but it is the say of the prosecution that on 03.04.04, the accused was intercepted and arrested under section 122 (C) of the Bombay Police Act and thereafter the police investigated and found that it is the very person who is involved in the offence committed qua the complaint of the complainant originally registered at Abu Road. The prosecution has explained that why the complainant was called to participate in the T.I. Parade arranged by the police. It is alleged that the complainant was informed to come down to Ahmedabad and in the identification parade arranged by the Executive Magistrate, the complainant identified the present appellant-accused as the person who had offered him a cup of tea and

thereafter a biscuit after developing some acquaintance posing him to be a person hailing from Rajasthan. It is the case of the prosecution that the complainant had become unconscious and before that he felt some abnormal physical condition, and therefore, he had occupied the upper berth of compartment but he was taken out of the railway compartment by the police and was admitted in hospital. It is the say of the complainant that after occupying the upper berth, he was not at all aware about the events occurred thereafter and he found himself in the coat of the hospital when he regained consciousness and Doctor had informed him about the details and the situation in which he was brought into the hospital. In the hospital, the complainant realized that he lost his luggage and an amount of Rs.5000/- which was kept in the pocket of his pant. He has also expressed a suspicion that the man with whom he was talking in the compartment, who offered him a cup of tea and biscuit has taken away his luggage and cash from his pocket.

According to Mr. Prajapati, though the story told by the complainant at the time of registering the complaint has been stated by him during the course of deposition, the learned trial Judge ought not to have accepted his version because there is nothing on record to show that the present appellant was the person who has taken away the luggage and the money from the pocket of the victim. According to Mr. Prajapati, the police has attempted to implicate the accused only with a view to settle undetected crime on mere suspicion and has taken disadvantage of the arrest of the appellant made on 03.04.04 under section 122 (C) of the Bombay Police Act. According to Mr. Prajapati, the act of identifying the

accused after about 2 years by the complainant in the T.I. Parade ought not to have been accepted as a relevant piece of evidence because there is ample scope for commission of a mistake in identifying a person on the impression that may be there in the mind of the complainant of the incident that has taken place two years ago in a railway compartment, and that too, during the night hours. He, therefore, submitted that the evidence led in the nature of T.I. Parade ought not to have been held to be a reliable piece of evidence, and if the Court is of the view that the evidence collected and led during the course of trial by prosecution about T.I. Parade as a weak piece of evidence, then the act of identifying the accused in the Court would not carry the case of the prosecution any further. In short, according to Mr. Prajapati, the accused should have been given benefit of doubt. He further submitted that the findings arrived at by the learned trial Judge is not legal and the accused could not have been held guilty merely on the moral conviction of the Presiding Officer of the Court.

Another argument advanced by Mr. Prajapati is that there is not even an iota of evidence so far as the charge for the offence punishable under section 394, IPC, is concerned because there is no evidence that any injury was caused by the accused or the intention of the accused was to commit offence punishable under section 394 of the IPC. The prosecution was under an obligation to prove that a robbery is committed. Each theft does not become robbery automatically and the prosecution is supposed to prove whether robbery as defined under section 390, IPC, is committed. It is not the case of the prosecution that any extortion was made by the accused. So the offence

punishable under section 394 ought not to have been held to be proved by the learned trial Judge. Mr. Prajapati has also placed reliance on a judgment reported in AIR 1955 AJMER 48 in the case of PEMA vs. STATE OF AJMER wherein the Court held that the conviction under section 328, IPC is unsustainable but upheld the conviction under sec.304 read with sec. 109, IPC.

There is strong resistance to the submissions made by Mr. Prajapati by learned Additional Public Prosecutor, Ms. D.S. Pandit appearing for the State. According to her, T.I. Parade was arranged immediately after the arrest of the accused and Ahmedabad Police was vigilant in calling the complainant. The act of calling the complainant from his home is nothing but an attempt to ascertain whether the complainant was victim of the offending act of the person arrested or not. The Court has considered various aspects including the circumstances in which the accused was intercepted and arrested. When the accused was arrested by the Ahmedabad Police, he was on the railway platform and was found carrying a packet of biscuit and that was recovered and sent for analysis to the Forensic Science Laboratory. Report sent by the Forensic Science Laboratory reveals that the biscuits contain psychotropic substance and a person might become unconscious if it is introduced into the body of a person. Looking to the nature of the complaint, the complainant was called. The incident that had occurred in the life of the complainant was so grave and shocking that he would not forget the face of the person who had conversed with him for some time and had offered him a cup of tea and biscuit. The complainant has narrated the details of each event that had occurred

to him after his entry in the train compartment on the date of the incident. When the complainant found that he was feeling abnormal, he has not even suspected that the accused must have played with him and had occupied the upper berth. It is proved by the complainant that he started feeling an abnormal condition after consuming the biscuit given by the accused, and there is no reason for the trial Judge to disbelieve him. So the circumstantial evidence collected by the investigating agency by arresting the accused with a packet of biscuit smeared with psychotropic substance or spurious drug would positively help the prosecution and the learned trial Judge, according to learned APP, has appreciated all relevant aspects. According to her, if the initial part of the story told by the complainant is found convincing, then there is little scope to reject the evidence collected by the prosecution in the nature of T.I. Parade panchnama. The complainant has proved that he had identified the accused in the presence of Executive Magistrate in his deposition. Detailed cross examination has been made on this point, but the complainant has stood to the test. The Executive Magistrate has also proved the panchnama and it was difficult for the trial court to disbelieve the complainant as well as the Executive Magistrate. On the contrary, the evidence of executive Magistrate clearly corroborated the view of the complainant.

It is further submitted by the learned Additional Public Prosecutor that if the definition of robbery is seen, the act of the accused of offering biscuit smeared with psychotropic substance or any such drug is an act committed so that the victim can be restrained wrongfully

in protecting himself or his property. Therefore, when a theft is committed by a person coupled with some further wrong described in section 390, IPC, then it would become a robbery. True it is, no muddamal has been recovered but ultimately recovery of muddamal perhaps would have added some more strength to the case of the prosecution but after lapse of two years, it was not possible for the court to recover any cash or kind from the accused. It is relevant to note that when the accused was arrested under section 122 (C) of the Bombay Police Act, he was not found with any article, except a packet of biscuit as aforesaid, which would pose him a genuine passenger on the railway platform. This circumstance is a speaking circumstance against the accused.

Having considered the reasons assigned by the learned trial Judge and the argument advanced by the learned Additional Public Prosecutor, this Court is of the opinion that there is no element of either perverseness or illegality in the findings recorded by the learned trial Judge. There was no reason for the learned trial Judge to say that the evidence led by the prosecution is full of material contradiction and is not sufficient to link the accused with the crime. The fact of arrest of the accused from railway platform is not at all challenged by the accused. There was no reason for the complainant to implicate the accused falsely when he was not to get anything from either the police or the accused as no muddamal was recovered. The complainant is a literate person,w as serving in the State of Tamil Nadu was returning to Rajasthan on leave. Being a native of a Hindi speaking State, if he is efficiently serving in a shop in South India, he must have developed enough

intelligence. So he was not a rustic villager. It would be incorrect to say that the learned trial Judge ought not to have placed any reliance on the memory of the complainant when he was describing the incident occurred to him.

The decision in the case of PEMA vs. STATE OF AJMER reported in AIR 1955 AJMER 48 also would not be of any help to the accused. The facts of the said decision are entirely different. In the said decision, the accused was charged for offences punishable under sections 304 and 328 of IPC. It was alleged that the accused being a Pujari of a temple, had offered Gur mixed with Dhatura seed which was taken by a boy and his mother. Both became unconscious and later on, the boy died. On appreciating the evidence, the Court found that the accused is guilty of the offence punishable under section 304 IPC and not under section 328. As per the evidence, nothing was taken either from the boy who died or from the mother. So the accused had no intent to cause hurt or to commit or to facilitate the commission of an offence. In the present case, the intention in the mind of the accused was to take away the luggage of the victim and the money lying in his pocket. To secure this goal, initially of cup of tea was offered and thereafter a biscuit. The act committed by the accused is narrated by the complainant and it points to nothing but the guilt of the accused and the complainant consumed the biscuit under an unexpressed bonafide trust on a co-passenger and without doubting the conduct of the person who offered the biscuit. True it is, the prosecution could have led some evidence by recovery of muddamal, especially the suit-case carried by the complainant, but as observed

earlier, non-recovery of muddamal does not make the case of the prosecution weak. In the circumstances the learned trial Judge cannot be said to have committed any error in holding the accused guilt of the charge of offences punishable under section 328 and 394 of IPC. The reasonings given, relating the accused with the crime are found sound, logical and legal.

The court is conscious that in an appeal under section 374 read with section 386 IPC when preferred, the court is supposed to evaluate the evidence afresh and if need be, as an appellate court, this Court can re-write the entire judgment while confirming or reversing the findings of the trial Court. However, if this Court is of the view that the reasons assigned by the learned trial Judge, while holding the accused guilty, are legal, logical and probable, then this Court can simply adopt the reasons assigned by the learned trial Judge and confirm the ultimate findings recorded by the learned trial Judge. Thus, adopting the reasons assigned by the learned trial Judge and in the background of the discussions made hereinabove, the present appeal is hereby dismissed. The order of conviction and sentence passed by the learned trial Judge in Sessions Case No. 311 of 2004 is hereby confirmed.

[C.K.BUCH, J.]

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